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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 71

THE UNITED STATES OF AMERICA, PETITIONER

v.

FRANK LAUDANI

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 241–248) and dissenting (R. 248–249) opinions in the Circuit Court of Appeals are reported at 134 F. (2d) 847. The memorandum opinion of the District Court overruling respondent's demurrer and motion to quash the indictment appears at R. 25–29.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 16, 1943 (R. 250), and a petition for rehearing was denied April 20, 1943

(R. 251–252). The petition for a writ of certiorari was filed May 24, 1943, and granted October 11, 1943 (R. 252). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

STATUTE INVOLVED

Section 1 of the Act of June 13, 1934 (c. 482, 48 Stat. 948, 40 U. S. C. 276b), commonly called the "Kick-back" Act, provides:

> That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.[1]

[1] The Act is in two sections, the second of which reads (40 U. S. C. 276c):

> To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit

QUESTION PRESENTED

Whether the prohibition of Section 1 of the "Kick-back" Act applies to a foreman who has authority to hire and discharge employees and who, acting for his own benefit and not on behalf of the employer, compels them to surrender a portion of their wages to him as a prerequisite to the retention of their jobs.

STATEMENT

Respondent and one Rossi, together with several others, were charged in a series of indictments with violations of the "Kick-back" Act of June 13, 1934 (R. 14–18, 241–242). Except for differences in names of the defendants and in allegations as to the names of victims, dates of the violations, and sums of money exacted, the counts of the indictments were couched in identical language (R. 14, 25–26). They alleged that between January 1, 1937, and May 15, 1938, there was under construction at Weehawken, New Jersey, a certain public work known as the Weehawken Plaza connection of the Lincoln Tunnel under the

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with respect to the wages paid each employee during the preceding week.

[The functions of the Secretaries of the Treasury and the Interior under this section were transferred to the Secretary of Labor, to be administered by him or under his direction or supervision by such agency in the Department of Labor as he should designate, by Reorganization Plan No. IV, Section 3, effective June 30, 1940 (see note under 40 U. S. C. A. 276c).]

Hudson River from New York to New Jersey; that the work was being done under a contract between the Port of New York Authority and George M. Brewster & Son, Inc., the general contractor, and a subcontract between the Brewster Company and the Cape Ann Granite Company, Inc., for the furnishing and setting of granite rubble facing and coping necessary in the construction of the Weehawken Plaza connection; that all of this public work was being financed in part by grants from the United States; that respondent was foreman for the Cape Ann Granite Company, with authority to employ and discharge stonecutters and masons, and knew that the rate of pay for such employees, as fixed and posted on the work, was a certain amount per hour, and that these employees were entitled to receive the full posted rate of pay without deductions for any purpose; and that respondent and his codefendants, by intimidation and threats of dismissal and by giving to understand that all persons employed on the work would be required to give the defendants parts of their true wages so long as they were so employed, induced certain named employees to surrender to them parts of the compensation to which the employees were entitled for work and labor on the public work (R. 14–15, 26).

The defendants filed a demurrer (R. 19–22) and motion to quash (R. 22–25) the indictments

on the ground, *inter alia*, that it was not alleged that they were the employers of the victims, or that they were acting on behalf of the employer in inducing the victims to give up part of the compensation to which they were entitled (R. 19, 20, 23). The demurrer and motion to quash were overruled by the judge hearing them, in a written opinion (R. 25–29).[2]

The Government elected to proceed on five of the indictments, containing 29 counts, and after a severance as to the defendants other than respondent and Rossi these indictments were consolidated for trial (R. 32–33). Respondent was convicted on nine of the counts in four of the indictments tried (R. 208, 218),[3] and he was sentenced to nine months' imprisonment on each count, the sentences to run concurrently (R. 219).[4]

The evidence in support of the allegations of the counts on which respondent was convicted may be summarized as follows:

[2] The case was tried before another judge, and the same objection was renewed at the opening of the trial (R. 30–32), at the close of the Government's case (R. 135–136), and at the conclusion of all the evidence (R. 179, 183), and by a motion in arrest of judgment (R. 210), and was in each instance overruled (R. 32, 136, 180, 183–184, 210).

[3] At the close of the trial the Government consented to the dismissal as to respondent of all three counts of one indictment and seventeen of the counts of the remaining four indictments (R. 180–182, 208).

[4] Rossi was acquitted on all the counts submitted as to him (R. 208).

In 1936 the Port of New York Authority undertook to construct, as part of the Lincoln Tunnel project, certain installations at the New Jersey approach, and the United States, through the Public Works Administration, granted $4,780,000 to the Authority to aid in financing these works (Ex. G–5, R. 39; R 50). Contracts for portions of the works were let by the Authority to George M. Brewster & Son, Inc. (Exs. G–6, G–7, R. 40), which, in turn, entered into subcontracts with the Cape Ann Granite Company, Inc., for furnishing and setting granite rubble facing and coping at the Weehawken, New Jersey, approach to the tunnel (Exs. G–8, G–9, R. 42). In accordance with the requirements of Title II, Section 206, of the National Industrial Recovery Act (June 16, 1933, c. 90, 48 Stat. 195, 204–205; 40 U. S. C. 406) and regulations promulgated thereunder (44 C. F. R. 265.1, 265.11–265.34), both the prime and subcontracts—the latter by reference to the former (see Ex. G–8, p. 4; Ex. G–9, pp. 1, 3)—contained provisions fixing minimum wage rates for employees and requiring that a statement of all wage rates be posted at the site of the work and that each employee be paid the full amount accrued to him, without deductions or rebates (Ex. G–6, pp. 44–45; Ex. G–7, pp. 93–94), regardless of any contractual relationship between the employer and such employee (Ex. G–7, p. 97).

As foreman for the Cape Ann Granite Company on the Weehawken approach, respondent had power to hire and discharge employees (R. 48, 117, 153). Victims named in counts on which re-

spondent was convicted testified that they were hired by him (R. 55, 79, 87, 92) and that, of the wages they received from the company, which did not differ from the posted rates, they "kicked back" to respondent, directly or through other workers on the job, from 25 to 35 cents for each hour of their employment (R. 56–59, 61–63, 68, 81–82, 84, 87–91, 93; see also R. 48–49, 97, 99–100). The victims were compelled by respondent to make these payments as a condition of obtaining and retaining their employment (R. 56–58, 65, 88–89). The Cape Ann Granite Company did not authorize these activities on the part of respondent and knew nothing of them (R. 48–49; see also R. 159).

On appeal to the Circuit Court of Appeals for the Third Circuit, respondent's conviction was reversed and the case was remanded to the District Court with directions to quash the indictments (R. 248, 250). This decision (R. 241–248), from which one judge dissented (R. 248–249), was based upon the ground that "the facts alleged and proven by the government do not lay a case within the purview of the statute * * *" (R. 242). The basis of the decision was, primarily, that "the statute as written" is confined in its "application to a situation where the employee gives up or cedes a portion of his contractual wage to or in favor of or at the instance of the employer or one acting for or on behalf of the employer" (R.

243). The employer must be "enriched" by the giving up by the employee of a part of his compensation (R. 244).[5]

In reaching this conclusion the majority reasoned as follows: The evil at which the statute is aimed is the inducing of the employee to give up part of the compensation to which he is entitled under his "contract of employment." The "contract of employment" means "the contract between the employee and his employer."[6] It is essential, therefore, to the crime defined by the statute that there be "the impairment, violation or derogation of the employee's contractual right with respect to the wages he is to receive." The one who is "capa-

[5] The court, therefore, did not find it necessary to pass upon the contention made by respondent, as appears from his brief in that court, that the evidence was insufficient in other respects to convict, and consequently it did not review the evidence in that connection (R. 242). The brief of respondent in the Circuit Court of Appeals discloses also that there were other contentions as to the rejection of evidence, refusal of requested instructions, and modifications of requested charges which were not passed upon by that court. This brief will, consequently, discuss only the question of statutory construction upon which the decision rested.

Since the case will, we believe, have to go back to the district court for a new trial because of error in the argument of the prosecutor (see footnote 9, *infra*, p. 13), it may be appropriate, if the Government is right in the position which it takes in this brief, to remand the case to the Circuit Court of Appeals so as to give that court an opportunity to pass upon the questions which it did not consider, before any retrial is attempted.

[6] Citing *United States* v. *Golder*, 11 F. Supp. 870, 871 (E. D. Pa.).

ble of so offending, because of the requisite privity of contract, is the employer." The employee, therefore, must give up or cede to the employer, either directly or to someone acting for him, some portion of the wages to which his contract with the employer entitles him.[7] (R. 243–244.)

The majority found support for this view in the expressed purpose of the statute, as reflected in its title: "An Act to effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes." It said: "So long, therefore, as the employer pays his employees the wages to which they are entitled under their contracts of employment and the employees are not induced or required to give back any part of their compensation, it cannot be said that they have been prevented from receiving the compensation to which their contracts of employment entitle them"; that "What happens to the compensation after the employee has received it in full, and wholly without relation to or effect upon his contract of employment, is a matter with which this statute does not purport to deal" (R. 244).

The legislative history was thought to leave little doubt that the Act "was intended to penalize con-

[7] Citing the *Golder* decision and *United States v. Charlick*, 26 F. Supp. 203, 205 (E. D. Pa.), both decided by the same judge, and 19 Comp. Gen. 576, 577–578 (R. 237–240).

tractors who, enjoying federal work or work federally aided,[*] unconscionably enrich themselves at the expense of their employees in denial of their contracts of employment" (R. 244).

The majority also attached some significance to Section 2 (footnote 1, *supra*, pp. 2–3), which authorized the Secretaries of the Treasury and the Interior jointly to make reasonable regulations "for contractors or subcontractors" on the work specified in Section 1 (R. 244–245). This provision was included, the majority said, as an aid to the enforcement of Section 1 (the penal provision); and it apparently felt that Section 1 for this reason cannot be given a broader coverage of persons than Section 2.

In further elucidation of the basis of its decision, the majority stated that "nowhere in the Act, its title, or its legislative history is it suggested that it was intended thereby to reach an extortioner or

[*] The majority stated (R. 245):

> Of course, no distinction is to be drawn, and we make none, between work for which the government directly lets a contract to which "the prevailing rate" of wage to the contractor's employees attaches by virtue of the Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494, as amended, and federally aided work performed for other public agencies to which rates of pay to employees attach by virtue of competent federal departmental regulations. The "Kick-Back Act" is broad enough to embrace all work financed in whole or in part by federal funds. In fact, the bill (S. 3041) was purposely amended in such regard in Senate committee. See Senate Report, supra. [S. Rep. No. 803, 73d Cong., 2d sess. (R. 235).]

blackmailer (not privy to the contract of employment) merely because the persons upon whom such an offender preys receive their compensation as employees of a contractor doing public work financed in whole or in part by federal aid"; that "no greater need for federal protection of workers against the threats of extortioners or blackmailers in general is indicated simply because their employer happens to derive all or a part of his income from work dependent upon federal loans or grants"; that "All other workers merit no less consideration." It said that a court was not justified in so extending the statute, as such a construction would involve offenses which, under our federal system, have been left to the criminal administration of the States, a pattern which should be adhered to in the absence of clear indication of a congressional design to duplicate state offenses; and it emphasized that the statute is penal and as such should be strictly construed. The majority also stated that any such extension of the scope of the statute, which it thought was inherent in the Government's interpretation, "suggests the possible invasion of the field of private rights and wrongs, unrelated to any federal interest or concern, which Congress is without constitutional warrant to enter upon." (R. 245–246.)

The dissenting judge agreed with the majority that the "contract of employment" referred to in the statute is the contract between the employer

and the employee; that the crime prohibited by the statute is the impairment or derogation of the employee's contractual right to the wages he is entitled to receive under the contract; and that the statute was not intended to apply to instances of extortion unconnected with the contract of employment (R. 248–249). But he was of the opinion that "to hold that the only person who is capable of offending against the statute is an employer, because only an employer is in privity of contract with the employee, is to emasculate needlessly an important criminal statute" (R. 248). He pointed out that while the language of the section is "very broad and is ambiguous," it does not make use of the word "employer" but uses the word "whoever" in reference to the person who may offend against the prohibition of the statute. He also felt that the legislative history demonstrates that its prohibition is not confined to the conduct of the employer but also covers the like enrichment of company "officials." (R. 248, 249.) He emphasized that the respondent was not a stranger in fact or in law to the contract of employment; that his company had employed him as foreman and put him in charge of the stonemasons, with the power to employ and discharge them; that his connection with these workmen was more direct and hence more influential than that of many a higher official of the company; that respondent was hence "in privity to the contract by representation, his rep-

resentation being that of his employer" (R. 248–249). He added that "Certainly, if the president or a director of a corporation caused an employee to kick back a part of his wages under threat of dismissal the acts of such an 'official' would be within the prohibition of the section. In my opinion, a foreman is an official of a company." While he agreed that the statute should be strictly construed, he stated that it should not be given a construction "so strict as to deny the fair intendment of Congress."[*] (R. 249.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the "Kick-back" Act is not applicable to a labor foreman having authority to employ and discharge employees, who, unknown to the employer, by threats of dismissal, forces employees under his supervision to give up to him part of the wages to which they are entitled under their contracts of employment;

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[*] Both the majority and dissenting judges (R. 246, 247, 248) agreed that the trial court committed reversible error in permitting the prosecutor to argue to the jury, over objection, that respondent should have produced as witnesses the numerous employees of the company whom he was not charged by the indictment with having subjected to extortion, so that they might testify that he had not exacted anything from them. We do not contend that this part of the decision of the court below was error. Hence, we concede that there must be a new trial even though the Court sustains our position on the question of statutory construction.

(2) In remanding the cause with directions to the District Court to quash the indictments.

SUMMARY OF ARGUMENT

The majority in the court below held that Section 1 of the "Kick-back" Act applies solely "to a situation where the employee gives up or cedes a portion of his contractual wage to or in favor of or at the instance of the employer or one acting for or on behalf of the employer." The "kick-back" must enrich the employer. Consequently, it held the section does not apply to a labor foreman of a corporation, acting on his own behalf, who, invested with the power to employ and discharge workmen, required them, under threat of dismissal from their employment, to give up to him a part of the wages which the company had paid them pursuant to its obligations.

This interpretation, espoused only by a minority of those judges who have construed the statute, is not supported by the statute's language, its manifest purpose, or its legislative history. Respondent's conduct is, we submit, within the statute.

1. The statute punishes "whoever" shall do that which is prohibited, i. e., "anyone" or "any person." It has been the custom of Congress to insert in penal statutes words of limitation following the word "whoever" where a limitation as to the coverage of offenders is intended. In labor legisla-

tion itself Congress has demonstrated that such general language as "any person" is not apt terminology where the employer alone is intended to be covered (see provisions of the Fair Labor Standards Act set out at p. 23, *infra*). If such a limitation had been intended in that portion of the instant statute which is in controversy, appropriate language was particularly needed in view of the reference to employers (contractors and subcontractors) in Section 2 and the breadth of the language utilized in describing the action prohibited. The exaction of a "kick-back" of wages from an employee "by force, intimidation, threat of procuring dismissal from such employment, or by any other maner whatsoever," certainly does not suggest methods which only an employer or one acting on his behalf would be capable of using.

2. There is nothing in the statute which indicates that Congress was concerned only with a breach of the contract of employment by the employer and intended merely to add criminal penalties for such a breach. As is evident from its sweeping terminology and avowed purpose, the statute had a broader and not quite so technical an end in view.

The statute was passed, as its title indicates, "to effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder * * *." The two statutes which the "Kick-back" Act was pri-

marily intended to fortify were the Davis-Bacon Act of March 3, 1931, and Title II of the National Industrial Recovery Act of June 16, 1933, particularly Section 206. Broadly stated, these statutes, which cover contracts for certain public construction by the United States as well as construction aided by Federal loans and grants to States, municipalities or other public bodies, made provision for the insertion in the contracts of stipulations to pay "the prevailing rate of wages" for similar work in the community in which the project is located (Davis-Bacon Act) and "just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort" (Section 206, Title II, National Industrial Recovery Act). It was vital to the success of this program of spreading purchasing power among the lower income groups and of eradicating substandard wages from federally financed projects, a program born out of national economic distress, "that the dollar which is intended for labor goes to that labor." While the "Kick-back" Act was not limited to contracts authorized by these statutes, there can be no doubt that the purpose of Congress in enacting it was to make it as certain as a criminal statute can that the intended recipient of wages made possible by the Government's money should have the full enjoyment and benefit of those wages; that no one should induce the workman to give up any part of the wages *qua* wages to which he is

entitled under his contract of employment. The purpose of the language in the statute "compensation to which he [the employee] is entitled under his contract of employment," is simply, therefore, to identify the money with which the statute is concerned—money paid as wages in connection with the performance of federally financed projects. While there must be a diversion of compensation, as such, to which the employee is entitled by virtue of his employment on a federally financed project, obviously a diversion of that type may be made as well by others as by an employer or one acting on his behalf; there is certainly nothing in the statute which indicates that the diversion must be by the latter or that it must result in the enrichment of the employer in contrast with others.

The conduct of the respondent, as the dissenting judge pointed out, was not at all unrelated to his victims' employment and comes clearly within the language of the statute as well as the evil it was designed to prevent. As he said, to accept the construction of the majority is "to emasculate needlessly an important criminal statute."

3. The interpretation contended for by the Government comports with accepted canons of construction and involves no constitutional difficulty. It is also fortified by the legislative history, which shows that Congress, when it enacted the statute involved, was aware that the responsibility for the

"kick-back racket" was shared not only by employers but also by foremen acting independently and by others having no relation to the employer. With this knowledge it provided, as a remedy, a penal statute sweeping in its terms and containing no limitation which, properly, can be construed as restricting it to action by or on behalf of the employer.

ARGUMENT

THE VIEW OF THE MAJORITY BELOW THAT THE STATUTE ENCOMPASSES ONLY A "KICK-BACK" TO AN EMPLOYER IS NOT SUPPORTED BY THE LANGUAGE OF THE STATUTE, ITS LEGISLATIVE HISTORY, OR ITS MANIFEST PURPOSE. THE RESPONDENT'S CONDUCT IS WITHIN THE STATUTE

This case is in narrow compass. It involves a labor foreman of a corporation which was participating as a subcontractor on public construction financed in part by federal funds. The company placed him in charge of a certain class of workmen and invested him with authority to employ and discharge such workmen. Clothed with the power which this grant of authority gave him, he required the workmen, as a prerequisite to the obtaining and retention of their jobs, to "kick back" to him a part of the wages which the company had paid them pursuant to its obligations. The company had not authorized the perpetration of this racket,[10]

[10] Presumably what is meant by the testimony to this effect is that those officials of the corporation who were empowered to set its policies had not sanctioned respondent's misbehavior.

did not know of it, and received none of its proceeds. The question presented is whether this conduct of the foreman is within the proscription of the "Kick-back" Act. The majority below held that it is not, because the statute interdicts only action by the employer or on his behalf; in other words, that the statute relates solely to the enrichment of the employer. We submit that there is no warrant for this construction in the language of the statute, its legislative history or its obvious purpose; and that the statute embraces the misconduct of respondent.[11]

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[11] Seven judges have had occasion to pass on the question of statutory construction which this case presents. Four have entertained a view contrary to that of the majority below (the two district judges and the dissenting judge in the Circuit Court of Appeals in this case, and the district judge in *United States* v. *McGraw*, 47 F. Supp. 927 (N. D. N. Y.), a decision to which he later adhered, despite the *Laudani* decision, in *United States* v. *Fuller*, decided September 7, 1943 (unreported officially, but copied in 6 Wage Hour Rept. 1090, 1091), saying: "A lower court should, and naturally does, give careful and serious study to the decisions of appellate courts of other circuits. After doing this, I find myself unable to accept the *Laudani* case as an authority here. I cannot narrow the statute to the confines of that case.").

Another district judge, in *United States* v. *Carbone* (Mass.), after overruling a demurrer to an indictment charging a conspiracy to violate the statute and also substantive violations thereof, which offenses did not involve or contemplate enrichment of the employer, sustained a motion to quash upon being advised of the decision of the majority below in the present case. The *Carbone* case is being held in abeyance, pursuant to a petition for rehearing filed by the Government, pending the disposition of the instant case.

The statutory language and design.—Unless it be found in the description of the action proscribed, there is clearly no language in the statute which limits its application to action by or on behalf of an employer. The statute does not say that "any employer" who shall do that which is inhibited shall be punished, but uses the word "whoever" to describe the persons subject to the Act. No broader word could have been used since the word "whoever" means, of course, "anyone" or "any person."[12] "Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them."[13] Moreover, an examination of the federal criminal statutes shows that when Congress has commenced them with the word "whoever," it has been its custom, in awareness of the breadth of that word, to insert words of limitation immediately following if a limitation as to the coverage of those who can offend is intended.[14] It is therefore only reasonable to be-

[12] Funk & Wagnalls, *New Standard Dictionary* (1937), p. 2709 ("anyone, without exception"); Webster's *New International Dictionary* (2d ed., 1936), p. 2921.

[13] *Caminetti* v. *United States*, 242 U. S. 470, 485–486, 490; *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 327; *United States* v. *Wurts*, 303 U. S. 414, 417.

[14] In Title 18 alone of the United States Code there are no less than 250 separate criminal provisions introduced by the word "whoever." As evidencing the custom of Congress to insert words of limitation immediately following the word "whoever" when a limitation as to offenders is in fact intended, see, for examples, 18 U. S. C. 1 ("Whoever, owing

lieve that had Congress intended the "Kick-back" Act to apply, as the majority below held (R. 243), solely "to a situation where the employee gives up or cedes a portion of his contractual wage to or in

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allegiance to the United States"): 18 U. S. C. 37 ("Whoever, being a person belonging to the armed land or naval forces of a belligerent nation or belligerent faction of any nation and being interned in the United States"): 18 U. S. C. 75 ("Whoever, being an officer authorized to administer oaths or to take and certify acknowledgments"): 18 U. S. C. 77a ("Whoever not being an officer, agent, or employee of the United States"): 18 U. S. C. 109 ("Whoever, except forest rangers," etc.): 18 U. S. C. 124 (Whoever, being engaged in the importation into the United States of any goods, wares, or merchandise, or being interested as principal, clerk, or agent in the entry of any goods, wares, or merchandise"): 18 U. S. C. 125 ("Whoever, being an officer of the revenue"): 18 U. S. C. 127 ("Whoever, being a consul, or vice consul, or other person employed in the consular service of the United States"): 18 U. S. C. 172 ("Whoever, being an officer, clerk, agent, employee, or other person charged with the payment of any appropriation made by Congress"): 18 U. S. C. 173 ("Whoever, being a disbursing officer of the United States, or a person acting as such"): 18 U. S. C. 184 ("Whoever, being an officer of the United States"): 18 U. S. C. 185 ("Whoever, being a clerk or other officer of a court of the United States"): 18 U. S. C. 189 ("Whoever, being an officer, clerk, agent, or other person holding any office or employment under the Government of the United States"): 18 U. S. C. 214 ("Whoever, being an officer or employee of the United States or a person acting for or on behalf of the United States in any capacity under or by virtue of the authority of any department or office thereof"): 18 U. S. C. 238 ("Whoever, being a judge of the United States"): 18 U. S. C. 492 ("Whoever, not being an owner"): 18 U. S. C. 497 ("Whoever, being a captain or other officer or mariner of a vessel upon the high seas," etc.): and 18 U. S. C. 3, 192, 193, 194, 195, 198, 199, 202, 203, 204, 205, 207, 215, 231, 235, 239,

favor of or at the instance of the employer or one acting for or on behalf of the employer," it would have been careful to insert after the word "whoever" language making clear that the statute was aimed at the employer alone.[15]

240, 264, 303, 305, 307, 310, 316, 318, 319, 322, 325, 328, 330, 331, 332, 333, 337, 352, 355, 356, 421, 422, 426, 427, 428, 432, 482, 483, 484, 485, 486, 494, 495, 496, 499, and 517.

Congress has even inserted words of limitation where the very nature of the act proscribed made the limitation unnecessary. See, for example, 18 U. S. C. 77a ("Whoever not being an officer, agent, or employee of the United States shall falsely represent himself to be such officer, agent, or employee," etc.). One who "falsely" represents himself to be an officer, agent, or employee of the United States obviously is not one; and so the statute would have contained the same limitation on the word "whoever" had it read "Whoever falsely represents himself to be an officer, agent, or employee of the United States."

Cf. the above sections with the following sections containing no words of limitation: 18 U. S. C. 4, 7, 22, 23, 24, 25, 36, 52, 71, 72, 73, 74, 76, 78, 79, 80, 82, 83, 86, 87, 90, 91, 92, 94, 95, 96, 97, 98, 99, 100, 101, 103, 104, 105, 106, 107, 110, 111, 112, 113, 116, 117, 118, 119, 120, 121, 123, 126, 128, 129, 130, 131, 132, 134, 136, 144, 145, 146, 147, 177, 187, 200, 212, 232, 233, 234, 236, 237, 241, 241a, 243, 244, 245, 246, 247, 248, 249, 250, 251, 253, 254, 262, 263, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 281, 282, 283, 284, 285, 291, 302, 304, 306, 308, 312, 313, 314, 315, 317, 320, 321, 321a, 324, 338, 338a, 338b, 339, 345, 347, 348, 349, 349a, 353, 354, 357, 358, 381, 387, 390, 396, 396a, 408a, 408c–1, 408d, 409, 412a, 415, 416, 423, 424, 425, 430, 443, 444, 445, 446, 455, 456, 457, 458, 462, 463, 464, 465, 466, 467, 467a, 468, 470, 481, 487, 488, 489, 490, 491, 493, 498, 502–512, 520, 522 and 552.

[15] This precaution was particularly necessary in view of the breadth of the language subsequently employed in describing the action prohibited and because of the reference in Section 2 to employers. See discussion at pp. 24–27, *infra*.

Indeed, in the very field of legislation with which we are here concerned, labor legislation, Congress has demonstrated its awareness that such general language as "any person" is not apt terminology where the employer alone is intended to be covered. Thus, Section 15 (a) (3) of the Fair Labor Standards Act of 1938 (52 Stat. 1068; 29 U. S. C. 215 (a) (3)) provides that "it shall be unlawful for any person * * * to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee," and Section 16 (a) of the same Act (52 Stat. 1069; 29 U. S. C. 216 (a)) provides that "Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof" be subject to certain punishment. In contrast, however, Section 16 (b) (29 U. S. C. 216 (b)) visits certain civil liabilities upon "Any employer who violates the provisions of section 6 or section 7" of the Act. Interpreting Section 15 (a) and related provisions in the Fair Labor Standards Act, the same court which decided the instant case held, in a civil suit (*Bowe v. Judson C. Burns, Inc.*, 137 F. (2d) 37, 39 (C. C. A. 3)), that the words "any person" in that section, so far at least as the discrimination provi-

sion is concerned, are not confined to an employer.[16] And in *Meek* v. *United States*, 136 F. (2d) 679, 680 (C. C. A. 6), a later criminal proceeding under Section 16 (a) for violating Section 15 (a) (3), it was said, following the *Bowe* case, "as there pointed out, the differentiation between the prohibitions in other setcions of the Act directed to the 'employer,' and those here directed to 'any person' is significant of the intent of the Congress."

A parallel situation prevails under the "Kickback" Act. In its second section (footnote 1, *supra*, pp. 2–3), which was enacted expressly "to aid in the enforcement" of Section 1, the section here involved, the Secretaries of the Treasury and the Interior were authorized to make regulations for "contractors and subcontractors" on the building or work specified in Section 1, including a provision that "each contractor and subcontractor" should furnish a weekly affidavit with respect to the wages paid "each employee" during the preceding week. These provisions, of course, refer to employers.[17] While the majority in the court be-

[16] The court rejected a contrary interpretation by the district court (*Bowe* v. *Judson C. Burns, Inc.*, 46 F. Supp. 745, 749 (E. D. Pa.)).

[17] The purpose of the provision for submitting verified weekly pay rolls apparently was to provide a method of ascertaining readily the amount that employees are receiving or supposed to be receiving from their employer. A witness at a Senate subcommittee hearing who recommended the provision advanced as a reason for it self-protection of the employer. Hearings, Subcommittee of S. Committee on Commerce, S. Res. 74, 73d Cong., 2d sess., Vol. I, pp. 791, 794, 797.

low seemed to think that this reference in Section 2 to employers fortified its conclusion that Section 1 likewise was limited to employers (R. 244–245), we think it must be evident that the difference in language between the two sections makes for the opposite result—that Congress used the broader language of Section 1 intentionally.

The breadth of offender coverage in Section 1 epitomized by the use of the word "whoever," together with the specific limitation of Section 2 to employers by the use of the words "contractors and subcontractors," make it apparent that Section 1 should not be confined in application to a "kick-back" which benefits the employer pecuniarily unless that result is compelled by other language in Section 1. We find no such language.

The section penalizes, in the broadest possible terms, anyone who shall "induce" any person employed in federally financed construction or repair work "to give up any part of the compensation to which he is entitled under his contract of employment, *by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever.*" [Italics supplied.] Clearly this language does not suggest methods of exacting a "kick-back" which only an employer or one acting for him would be capable of using. Neither the employer nor his agent would normally use "force" to "induce" a "kick-back" from an employee. And an employer would certainly use a

"threat of dismissal" rather than a "threat of procuring dismissal" in attempting to secure a "kickback."[18] While an agent of an employer might utilize a "threat of procuring dismissal" if it was desired to conceal his representation of the employer, the phrase, of course, equally fits others than such an agent. Also, since an employer, it would seem, would ordinarily go through the motion, at least, of paying the employee the prescribed wage, in order to make it appear that he was complying with the statute, an employee would generally "give back" rather than "give up," a part of his compensation to the employer. And, certainly, there was no occasion to use such a sweeping phrase as the concluding one "by any other manner whatsoever," if Congress had intended to interdict only action by or on behalf of the employer.

In sum, it is only reasonable to suppose that had Congress intended in Section 1 to prohibit employer action merely, it would have used language more appropriately descriptive of that type of action, particularly in view of the breadth of the in-

[18] In *United States* v. *McGraw*, 47 F. Supp. 927, 928 (N. D. N. Y.), it was pointed out, in reaching a decision opposed to that of the majority below, that "the words 'by force' and 'procuring' lose their meaning" if Congress had intended to limit the section to employers. See also quotation at p. 43, footnote 54, *infra*, from the later decision of the same court in *United States* v. *Fuller*, decided September 7, 1943 (unreported officially, but copied in 6 Wage Hour Rep. 1090).

troductory word "whoever" and the contrasting limitation of Section 2 to employers.

In complete disregard of the sweep of the statutory language to which we have adverted, the majority below pins its decision, so far as the face of the statute is concerned, solely upon the words "contract of employment." Preliminarily, it states that it seems plain from a reading of the statute that the evil aimed at is the inducing of an employee engaged in work of the character specified, "to give up any part of the compensation to which he is entitled under his contract of employment." No one can, of course, quarrel with that, but the majority below then proceeds to give this language of the statute a twist in meaning not discernible from any ordinary reading of it by isolating the words "contract of employment" and then making this phrase the focal point of its ratiocination.[19] The "contract of employment" means, the majority says, the contract between the employer and the employee.[20] If this be so, as

[19] In *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 542, this Court pointed out that "to take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute."

[20] In this connection (R. 243-244) the majority cites *United States* v. *Golder*, 11 F. Supp. 870, 871 (E. D. Pa.) which defined "contract of employment" as meaning "the agreement between the contractor and the workman, not the contract between the contractor and the public body in charge of the work," a definition later adhered to by the same judge in

may be assumed *arguendo*, the court then reasons, apparently, that unless there has been an impairment, violation, or derogation of the employee's contractual right with respect to the wages he is entitled to receive, he has not been compelled, within the meaning of the statute, to "give up" any part of such wages. The one who is capable of breaching the contract right to the wages is, of course, the employer because he is the other party to the contract. *Ergo*, the statute as written nec-

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United States v. *Charlick*, 26 F. Supp. 203, 205 (E. D. Pa.), and followed in 19 Comp. Gen. 576, 577–578 (R. 237–240). In the *Golder* and *Charlick* cases the "Kick-back" Act was held inapplicable to the employer because the "contract of employment" between the employer and the workman, although calling for the payment of a lesser wage than that required by the contract with the Government, was adhered to. We believe that these decisions are not correct because they ignore the Congressional purpose to insure that the minimum wage intended for the workman gets to him. *United States* v. *Morley Construction Co.*, 98 F. (2d) 781, 788–789 (C. C. A. 2), certiorari denied *sub nom.*, *Maryland Casualty Co.* v. *United States*, 305 U. S. 651; *United States* v. *Fuller* (N. D. N. Y.) decided September 7, 1943 (unreported officially, but copied in 6 Wage Hour Rept. 1090). But, in any event, it is unnecessary here to determine whether the "contract of employment" may not embody the anterior agreements, where there are such, since in this case the employer paid its employees the precise wages which had been agreed upon in the subcontract and the earlier principal contract (see pp. 6–7, *supra*).

The *Charlick* and *Golder* decisions did not deal with the problem here presented, and, hence, as the dissenting judge below said (R. 249), are "not apposite the question *sub judice*." The Comptroller General's decision, also, concerned a different question.

essarily has application only to a situation where the employee gives up or cedes a portion of his contractual wage to the employer or for his benefit. It is necessary that the employer be enriched (R. 243–244).

Shortly stated, the difficulty with this argument is that it breathes into the statute a concept which is simply not there, namely, that the statute is concerned only with a breach of the contract of employment by the employer and merely adds criminal penalties for such breach. The statute clearly has a broader and not quite so legalistic an end in view, as is evident from its avowed purpose and sweeping terminology.

As is apparent from its title, a declared object of the "Kick-back" Act was "to effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder * * *." At the time the "Kick-back" Act was passed (1934) there were two statutes, at least, which made provision for rates of pay on building construction and repair work financed in whole or in part by federal funds. One of these, the Davis-Bacon Act, enacted March 3, 1931 (c. 411, 46 Stat. 1494), provided, in its first section, for the inclusion, in every contract in excess of $5,000 for the construction or repair of public buildings of the United States or the District of Columbia, of a provision requiring the con-

tractor or any subcontractor to pay the mechanics and laborers as a minimum wage the "prevailing rate of wages" for similar work in the community in which the work is located.[21] The other statute, Title II of the National Industrial Recovery Act of June 16, 1933 (c. 90, 48 Stat. 195, 200 *et seq.*), designed to relieve unemployment and improve the standards of labor, made provision for a comprehensive program of public works to be carried out either directly by the Government or through loans and grants to states,

[21] This Act was amended on August 30, 1935 (c. 825, 49 Stat. 1011; 40 U. S. C. 276a–276a–5), after the enactment of the "Kick-back" Act, by making it applicable to contracts in excess of $2,000 instead of $5,000, and by requiring that the contract contain stipulations that the workmen are to be paid "directly upon the site of the work, unconditionally * * * and without subsequent deduction or rebate on any account," that the "prevailing wage" is to be paid "regardless of any contractual relationship" which may be alleged to exist between the contractor or subcontractor and his employees, that the scale of wages is to be posted in a prominent and easily accessible place at the site of the work, that the contract may be terminated by the Government if the required wage scale is not followed, and that there may be withheld from the contractor a sufficient portion of his accrued compensation to make good to the employees any deficiency in the amount received. In the event of the accrued payments withheld proving insufficient to make good any deficiency in the wages received by the employees the latter are expressly given a right of action against the contractor and his sureties, "and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds."

municipalities, or other public bodies, covering a certain percentage of the cost of labor and material. In Section 206 (48 Stat. 204–205; 40 U. S. C. 406) it was provided that "All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure * * * that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort * * *."[22]

Manifestly, the purpose of these statutes was to insure that the United States, in its proprietary capacity and in the exercise of its spending power, would not lend itself to any lowering of the living

[22] Pursuant to the authority contained in this Act (Section 209, 48 Stat. 206; 40 U. S. C. 409), an Executive Order (No. 6252) was issued by President Roosevelt on August 19, 1933, which, under the heading "Regulations," required that all wages paid for the construction authorized by the statute should be paid "in the full amount earned by each individual at the time of payment, not less often than once each week, and without deduction on account of goods purchased, rent, or other obligations, which obligations shall be subject to collection only by legal process"; that "Each contractor or subcontractor on any such project shall post in a prominent and easily accessible place at the site of the work a legible statement of all wage rates paid"; that "Should it appear that any individual employed on any such project has been or is being paid less than hereinbefore prescribed, the Administrator [Federal Emergency Administrator of Public Works] shall notify the employer of such individual to pay him all wages due according to the prescribed rate"; and that "Upon 10 days default on the part of such employer he shall be liable to the penalties provided in said Act for violation of these regulations."

standards of workingmen, and to provide instead that it set guideposts of employment.[23] They were born in a period of national economic distress and the *desiderata* were to effectuate a policy of spreading purchasing power among the lower income groups and to eradicate substandard wages from federally financed projects. It was vital to the success of this program "that the dollar which is intended for labor goes to that labor."[24] While the "Kick-back" Act was not limited in operation to the period of the depression, and applies to all contracts for construction and repair work financed in whole or in part by Government funds rather than merely to contracts executed pursuant to any particular construction program or for any certain amount, there can be no doubt that it was the Congressional design, in enacting it, to make it as certain as a criminal sanction can that intended recipients of wages made possible by the Government's money should have the full enjoyment and benefit of those wages; that no one should induce the workman to give up any part of the wages *qua* wages to which he is entitled under his contract of employment. The words of the statute "compensation to which he [the employee] is entitled under his contract of employment", have consequently no es-

[23] Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127.

[24] Hearings, Subcommittee of S. Committee on Commerce, S. Res. 74, 73d Cong., 2d sess., Vol. I, pp. 791–792.

[25] See 19 Comp. Gen. 576, 577–578 (R. 239–240).

teric meaning. Their purpose was merely to identify the money with which the statute is concerned, i. e., money paid as wages in connection with the performance of federal contracts for construction or repair work or in connection with other public construction made possible in whole or in part by grants or loans of federal funds. While the action which the statute interdicts must result in a diversion of compensation, as such, to which the employee is entitled by reason of his employment on a federally financed project, it is evident that a diversion of that type may be made as well by others as by an employer or one acting in his interest; and there is certainly nothing in the statute which indicates that the diversion must be by the latter or that it must result in the enrichment of the employer in contradistinction to others.

It is, we believe, unnecessary in this litigation to determine what may be the furthest reaches of a statute which is manifestly broad and sweeping.[26]

[26] For example, this case does not involve the validity of a union check off. However, a legitimate union check-off, the propriety of which is impliedly recognized in the provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, Secs. 8 (3), 9 (a), 49 Stat. 449, 452, 453; 29 U. S. C. 158 (c), 159 (a)) for the designation of exclusive collective bargaining representatives and authorizing closed-shop agreements with such representatives, would not, in our opinion, fall within the "Kick-back" Act, since it would constitute merely the collection by an otherwise lawful method of an assesment that the employee can validly be required to pay in any event as a condition of securing or retaining his employment; and the Secretary of Labor has so recognized

Certainly, to sustain the indictments in this case, the Government is not required to urge, as the majority below asserts (R. 246), that "the blackmailer, who, wholly unconnected with his victim's employment, requires and receives a part of the employee's wages each week for withholding knowledge of something which the latter desires to keep secret from his employer lest he lose his job, would be equally indictable." As was aptly pointed out by the dissenting judge (R. 249), the defendant in this case "was not a stranger in fact or in law to the contract of employment." He was the labor foreman of the subcontracting employer. His company placed him in complete charge of the stonemasons it employed, and he was vested with the plenary power of hiring and discharging them. So far as the workmen were concerned, he was "the boss." His connection with them, as the dissenting judge stated (R. 248), "was more direct and hence more influential than that of many a higher official of the * * * Company." It was by virtue of his relationship to the contract of

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by providing a procedure for securing authorization of a deduction that "is for the benefit of the employees or their labor organization through which they are represented and is provided for in a bona fide collective bargaining agreement." Section 2.5 (b) (2) (ii) of Regulations of Secretary of Labor (29 C. F. R.) as amended February 3, 1942 (7 Fed. Reg. 686, 688). In *Virginia Electric & Power Company v. National Labor Relations Board*, 319 U. S. 533, this Court impliedly recognized that a union not company-dominated may provide employees with a sufficient *quid pro quo* for the check-off.

employment that he was able to exact from the employees a portion of the wages to which they were entitled. His conduct was clearly within the language of the statute as well as the evil which it was designed to prevent. But the effect of the decision of the Circuit Court of Appeals is to exclude from the ambit of the statute not only respondent's conduct but analogous conduct by even the president or a director of a corporation acting for his own benefit. To give the statute such a construction is, to use again the language of the dissenting judge, "to emasculate needlessly an important criminal statute" (R. 248).

The rule of strict construction of penal statutes relied upon by the majority below does not require that such a statute "be strained and distorted in order to exclude conduct clearly intended to be within its scope."[27] While such statutes "may not by process of construction be extended beyond their reasonable and natural meaning, neither may they be, by the same process, deprived of their natural meaning."[28] The strict construction doctrine "does not require that the words of an enactment be given their narrowest meaning or that the lawmaker's evident intent be disregarded";[29] nor

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[27] *United States* v. *Raynor*, 302 U. S. 540, 552; *Fish Sheep Co.* v. *United States*, 252 U. S. 159, 170; *United States* v. *Corbett*, 215 U. S. 233, 242–243.

[28] *Spivey* v. *United States*, 103 F. (2d) 181, 185 (C. C. A. 5), certiorari denied, 310 U. S. 631.

[29] *United States* v. *Giles*, 300 U. S. 41, 48.

does it "require rejection of that sense of the words which best harmonizes with the context and the end in view."[30] Implied exemptions from a statute phrased in words of general application are not favored[31] and even express exemptions are often subject to a rule of strict construction.[32] The interpretation of the majority below adds to the statute a qualification which is not required by the plain meaning of its language, the manifest legislative intent, or constitutional considerations.[33] This the majority below was not permitted to do

[30] *Gooch* v. *United States*, 297 U. S. 124, 128.

[31] *Maxwell* v. *Moore*, 22 How. 185, 191 ("the rule is, that where the Legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so"); *United States* v. *City Nat. Bank of Duluth*, 31 F. Supp. 530, 535 (D. Minn.); *Garrison* v. *Sumners*, 223 Ala. 17, 18 (1931).

[32] See *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56 (C. C. A. 8), relating to an exception in the Fair Labor Standards Act, which has an analogous end in view.

[33] Since the Government is not here urging the application of the statute to the conduct of one who was "wholly unconnected with his [victim's] employment," there is not here presented the constitutional problem which the Circuit Court of Appeals felt that such a construction might involve (R. 246). If, as we submit, the statute plainly covers conduct so closely related to the contract of employment as that of respondent, there can be no doubt that in its application to that conduct the statute is no more vulnerable to attack from a constitutional standpoint than in its application to analogous conduct by or on behalf of the employer, as to which, of course, the majority below had no constitutional doubts. The question here is simply one of determining the scope of the statute within an indisputably constitutional field.

It cannot be gainsaid that the construction contended for by the Government projects the legislation into fields which

"under the guise of construction because, as this court has so often held, where the words are plain there is no room for construction." [34]

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are or may be covered by state criminal law (although certainly not, however, to the extent the majority below assumes (R. 245–246)), but, of course, this is likewise true of the interpretation espoused by the majority below [cf., for example, the New York "Kick-back" statute (Laws 1934, c. 171) adopted at the same time as the Federal Act and for the purpose of combating the same evil. See *People* v. *Meyer*, 167 Misc. 287, 3 N. Y. S. (2d) 870 (City Magistrate's Court, Borough of Manhattan, 1938); *People* v. *Besowitz*, 166 Misc. 1, 2 N. Y. S. (2d) 87 (City Magistrate's Court, Borough of Manhattan, 1938)]. It was recognized, as the hearings before the Senate committees show, that the proposed legislation would overlap state law (Hearings before a Subcommittee of the Senate Committee on Commerce, pursuant to S. Res. 74, 73d Cong., 2d Sess., Vol. I, pp. 817–818; Hearings before a Subcommittee of the Senate Committee on Education and Labor, pursuant to S. Res. 228, 73d Cong. 2d Sess., pp. 23–24). But the majority does not assert that this duplication of offenses presents any constitutional problem in and of itself, as clearly it does not (*Jerome* v. *United States*, 318 U. S. 101, 105). It calls at most, as this Court pointed out in the *Jerome* case, for a nonextension of the duplicating federal statute beyond its clear terms, something which we do not urge.

[34] *Osaka Shosen Line* v. *United States*, 300 U. S. 98, 101; *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89; *Caminetti* v. *United States*, 242 U. S. 470, 485, 490; *Mackenzie* v. *Hare*, 239 U. S. 299, 308; "It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate"; *Forrestal* v. *Commissioner of Internal Revenue*, 120 F. (2d) 223, 225 (C. C. A. 2).

The legislative history.—While we think there can be no doubt that the statute on its face embraces such conduct as that of the labor foreman involved in this case; this view is fortified, we submit, when consideration is given to the legislative history, reflecting the nature and extent of the evil that brought about the statute's enactment.[35] For a considerable period prior to the introduction of the bill which became the "Kick-back" Act there had been extended hearings before a subcommittee of the Senate Committee on Commerce, pursuant to S. Res. 74, 73d Cong., 2d sess.,[36] and hearings before a subcommittee of the Senate Committee on Education and Labor, pursuant to S. Res. 228, 73d Cong., 2d sess.,[37] were in progress at the time of the bill's enactment.[38] The testimony taken at these hearings reveals that responsibility for the "kick-back racket" was shared not only by em-

[35] In *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 543–544, this Court indicated that it could turn to any "available information for reaching a correct conclusion" as to the interpretation of a statute however clear the words of the statute might appear to be.

[36] "Authorizing an investigation of the matter of so-called 'rackets' with a view to their suppression."

[37] "Authorizing an investigation of the relationship existing between certain contractors and their employees in the United States."

[38] The hearings before this subcommittee continued after the passage of the "Kick-back" Act and resulted in the amendment of August 30, 1935, to the Davis-Bacon Act (see footnote 21, *supra*, p. 30). Unless otherwise stated, we refer in this brief only to what was brought out at those hearings prior to the enactment of the "Kick-back" law.

ployers but also by foremen acting independently and by others having no relation to the employer. One of the principal witnesses before the subcommittee of the Senate Committee on Commerce was Mr. George J. Atwell, president of the George J. Atwell Foundation Corporation. That his testimony was most influential is evidenced by the fact that it was he who suggested, for the purpose of furthering effective enforcement, the provision that became Section 2 of the "Kick-back" Act.[39] He stated that in order to make effective government policy in providing employment "we must see to it that the dollar which is intended for labor goes to that labor",[40]—that "Otherwise millions of dollars intended to reach the laborer will find its way into the pockets of the racketeers or dishonest or unfair contractors."[41] On the basis of his own company's experience he said that "Contractors themselves can help the situation if they are not themselves involved in the racket;"[42] that his own company included in every pay envelope a notice to the employees "not to pay any money to anyone to obtain or hold your job;"[43] that "In my case, on my job, I had a foreman for 10 years, and care-

[39] Hearings, Subcommittee of Senate Committee on Commerce, S. Res. 74, 73d Cong., 2d sess., Vol. I, pp. 791, 794–797. See also footnote 1, *supra*, pp. 2–3; footnote 17, *supra*, p. 24.

[40] *Ibid.*, 791–792.

[41] *Ibid.*, 791.

[42] *Ibid.*, 791.

[43] *Ibid.*, 790.

ful as I was about it, I found he was selling tickets to the men for shore dinners at $5 apiece. To get a job you had to buy a ticket. Then I found out that the shore dinner was never held. So that was another form of 'kick-back' ";[44] and that "The men have told me that they are forced to join social clubs where they must pay a very high rate of dues. That is another form of 'kick-back'."[45] Another witness, Mr. Adolph Dzik, an attorney for the Anti-racketeering Committee of the A. F. of L. Building Trades Unions of New York, testified to complaints from a number of labor unions that during the construction of the Roxy Theatre in New York plasterers' helpers received $8.50 a day (the prevailing union wage) in their pay envelopes but "were required to pay back a day or two after receiving their pay, to the labor foreman, the sum of $2.50 per day."[46] The then United States Attorney for the Eastern District of New York, Mr. Ameli, wrote to the subcommittee of instances "where certain superintendents or labor foremen exacted tribute from various men employed on the construction jobs, the threat being that if the money was not paid, they would lose their jobs."[47] The testimony before the subcommittee of the Senate Committee on Education and Labor likewise re-

[44] *Ibid.*, 790–791.
[45] *Ibid.*, 791.
[46] *Ibid.*, 801.
[47] *Ibid.*, 826.

veals instances of the participation of foremen in the "kick-back racket."[48]

While the committee reports on the "kick-back" bill were very brief and did not advert directly to "kick-back" practices on the part of foremen or others acting independently of the employer, the Senate Committee on the Judiciary, in reporting the bill favorably (R. 235), stated that "Hearings of the Senate Committee on Racketeering[49] revealed that large sums of money have been extracted from the pockets of American labor, to *enrich* contractors, subcontractors, *and their officials.*"[50] [Italics supplied.] In view of the evidence before the investigating committee that foremen were guilty of such abuses, it would seem clear that the Judiciary Committee's reference to "officials" was meant to include foremen as well as higher company executives. Furthermore, the word "enrich" in the report of the Committee clearly refers to "officials" individually, since they are not enriched if they merely act at the instance and on behalf of the employer. The report of the

[48] Hearings, Subcommittee of Senate Committee of Education and Labor, S. Res. 228, 73d Cong., 2d sess., pp. 5, 80–81, 152, 159. For further instances shown by testimony given at the same hearings though subsequent to the enactment of the "Kick-back" Act, see *ibid.*, 280–290, 333, 341–342, 428.

[49] Reference is undoubtedly to the hearings before the subcommittee of the Senate Committee on Commerce, which subcommittee had proceeded under a resolution authorizing investigation of so-called "rackets." (See p. 38, *supra.*)

[50] S. Rep. No. 803, 73d Cong., 2d sess. (R. 235).

Senate Committee, brief as it is, is therefore nevertheless sufficient to refute the conclusion of the court below that the Act was intended to apply only to cases where the employer is enriched by either his own action or action on his behalf. The report of the House Committee on the Judiciary (R. 236–237) referred only to "the so-called 'kick-back' racket by which a contractor on a Government project pays his laborers wages at the rate the Government requires him to pay them, but thereafter forces them to give back to him a part of the wages they have received,"[51] but in the brief debate on the floor of the House, Chairman Sumners of the House Judiciary Committee, in response to a direct inquiry,[52] stated that the bill was intended to apply to the abuses which had been disclosed by the Senate committee of which Senator Walsh was chairman (Subcommittee of the Senate Committee on Education and Labor).[53]

[51] H. Rep. No. 1750, 73d Cong., 2d sess. (R. 236).

[52] 78 Cong. Rec. 10759.

[53] If, despite what was said in the *American Trucking Associations* case (footnote 35, *supra*, p. 38), statements at Congressional hearings are ordinarily not appropriate legislative history (*R. F. C.* v. *Bankers Trust Co.*, 318 U. S. 163, 168, footnote 10), we submit that the testimony before the Senate subcommittees in this case should be considered in this case because of the reference to the testimony before the subcommittee of the Senate Committee on Commerce in the Senate Judiciary Committee report on the bill (*supra*, p. 41), and because of the reference to the testimony before the subcommittee of the Senate Committee on Education and Labor in the comment of Chairman Sumners of the House Judiciary Committee.

The legislative history of the Act thus shows, first, that the evil which led to its enactment was the "racket" whereby money supplied by the United States for construction and repair projects and intended for labor was in fact diverted from labor; second, that foremen acting independently and others unrelated to the victim's employer were participants in the "racket"; and third, that Congress had before it information as to the full extent of the evil at the time it provided, as a remedy, a penal statute sweeping in its terms and containing no limitation which can properly be construed as restricting it to action by or on behalf of the employer.[54]

[54] From its study of the legislative history, made after careful consideration of the decision of the majority below in the instant case, the District Court in *United States v. Fuller*, decided September 7, 1943 (unreported officially, but copied in 6 Wage Hour Rept. 1090), concluded (p. 1091): "A study of the history of the passage of the statute convinces me that even though much of the testimony and discussions had to do with "kick-back" to employers, the legislators were determined to stop the mulcting of public project workers by anyone using the means stated in the statute. The broader purpose is clearly expressed by the language of the law. The words 'anyone' in the title and 'whoever' in the text have such universally understood meanings that they are 'embodied in the maxim—*expressum facit cessare tacitum*.' A limitation of those words would not only make other words of the statute—such as 'force', 'intimidation' and 'procuring'—meaningless [. . . it would provide an easy device to circumvent a criminal statute. I must adhere to my former interpretation [in *United States v. McGraw*, 47 F. Supp. 927]."

CONCLUSION

For the reasons stated, it is respectfully submitted that the construction placed upon the statute by the majority below should be rejected; that the judgment of the Circuit Court of Appeals remanding the case to the District Court with directions to quash the indictments should be reversed; and that the case should be remanded to the Circuit Court of Appeals so that it may have the opportunity to consider other errors alleged to have occurred at the trial before it remands the case to the District Court for a new trial.[55]

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[55] See footnote 5, *supra*, p. 8.

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